Infinisource

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Room 5203
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

LEGAL PROCESSING DIVISION
PUBLICATION & REGULATIONS
BRANCH

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Re: **Comments on Proposed Cafeteria Plan Regulations**

To Whom It May Concern:

On behalf of Infinisource, Inc. and our employer clients, we want to comment on the above referenced Proposed Regulations. Based in Coldwater, Michigan, Infinisource is a benefit administrator that provides administrative services related to flexible benefits (including Flexible Spending Arrangements [FSAs] and Cafeteria Plans), HRAs, HSAs, COBRA and HIPAA to more than 15,000 employers nationwide. We are providing a total of 12 comments on the Proposed Regulations:

- **26 CFR §1.125-1: General Rules**

  - **Recommendation:** *Include an employee's spouse's COBRA or individual coverage as a qualified benefit in certain situations – §1.125-1(a)(3)(c) & (m)(1).*

    Among the qualified benefits that a cafeteria plan may offer are "COBRA continuation coverage of an employee" and "payment or reimbursement of employees' substantiated individual health insurance premiums." While it is clear that non-employee spouses and dependents are not allowed to participate in a cafeteria plan in accordance with 26 USC §125(d)(1), it could be argued that if the employee is covered under the spouse's coverage – whether it is COBRA or individual insurance – that makes the employee a participant in such a plan.
    Thus, Infinisource recommends that premiums for health coverage under the spouse's name where the employee participates should be eligible for reimbursement under the employee's cafeteria plan.

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- **Recommendation:** *Include list-billing as a method for reimbursement of individual insurance premiums -- §1.125-1(m)(2).*

  In illustrating how individual accident and health insurance premiums are reimbursed, the Proposed Regulations provide an example that lists three methods of reimbursement where the plan:

  Direct reimbursement to the employee after substantiation of premium payment
  Reimbursement to the employee via a check payable to the insurance carrier
  Reimbursement to the employee via a check payable jointly to the employee and the insurance carrier

  While the example is not necessarily an exhaustive list of reimbursement methods, a common approach has been the practice of list billing, where the insurance carrier submits a bill for all employees covered under individual policies through that carrier and the employer collects all employee salary reductions (plus any employer contributions) and sends payment directly to the insurance carrier, often electronically.
  Thus, Infinisource recommends that list billing be included in the example cited above as an approved method for reimbursing individual accident and health insurance premiums.

- **26 CFR §1.125-2: Elections**

  - **Recommendation:** *Clarify that a spouse, dependent or any other individual acting as a legal representative or possessing power of attorney may make elections on behalf of an employee in certain circumstances (e.g., incapacity) – §1.125-2(a)(4).*

    The regulations state that "only an employee of the employer sponsoring a cafeteria plan is allowed to make, revoke or change elections in the employer's cafeteria plan. The employee's spouse, dependent or any other individual other than the employee may not make, revoke or change elections under the plan." Plan administrators typically allow others to make elections for employees if they have power of attorney or some other legal authorization to do so.
    Thus, Infinisource recommends that the language be clarified to include these situations as an exception to the rule.

  - **Recommendation:** *Consider expanding the 30-day retroactive, optional election rule for new hires to address other similar situations: (1) rehires who are hired within 30 days, (2) employees who are subject to a waiting period, and (3) those with a HIPAA special enrollment for acquisition of spouse and dependent through marriage and loss of other group health coverage – §1.125-2(d).*

    We applaud this needed exception to the new hire election rules. This exception appears to be based on a dual purpose of easing administrative burdens and ensuring no gap in coverage. These purposes apply to eligible employees in other circumstances. First, the Proposed Regulations excluded employees who are rehired within 30 days of termination,

presumably because they would have no gap in coverage. However, many plans terminate coverage on the termination date, and thus may have a gap in coverage.

Second, many plans will have a waiting period (e.g., 30 or 60 days after hire). Despite having the time to prepare to make elections, some employees will not finalize their elections ahead of time.

Third, if an employee adds a newborn or adopted child, the election can be made retroactively. However, it is not currently available for other HIPAA special enrollment events.
Thus, Infinisource recommends that the 30-day retroactive, optional election right be expanded as indicated above.

- **26 CFR §1.125-5: FSAs**

  - **Recommendation:** *Clarify and expand the Advance Payment Rule for Orthodontia – §1.125-5(k)(3).*

    We recommend two clarifications and one expansion of this rule. First, the orthodontia exception is available "only to the extent that the employee has actually made the payments in advance of the orthodontia services *in order to receive the services*." One possible reading is that the advance payment must be the only option available, i.e., it is required by the provider. Typically, it is one of several options and is preferable because a discount is available with the advance payment. This should be clarified.

    Second, the orthodontia exception is available "only to the extent that the employee has *actually made the payments in advance* of the orthodontia services in order to receive the services." It is unclear whether an advance payment in Plan Year 1 would be reimbursable in Year 1 if services did not begin until Plan Year 2. We suggest that reimbursement should occur in either Year 1 (per the advance payment exception) or Year 2 (per the normal rule that expenses are reimbursed when incurred).

    Third, other services have similar advance payment options and should be included in this rule: prenatal services, infertility treatments, chemotherapy and other cancer treatments. We suggest that the IRS provide broader guidance on what types of expenses may qualify for this exception to the prohibition against deferred compensation.
    Thus, Infinisource recommends that the IRS clarify and expand the Advance Payment Rule (as indicated above) to provide additional flexibility to plan administrators while maintaining the intent of the original rule.

  - **Recommendation:** *Address an apparent inconsistency between two rules: the allowance of a post-deductible Health FSA based on the statutory minimum deductible and the requirement that a post-deductible Health FSA or HRA must have proof that the high-deductible health plan (HDHP) deductible has been satisfied – §1.125-5(m)(4)(ii) & (m)(6).*

A post-deductible health FSA need not be based on the HDHP deductible "but in no event may the post-deductible health FSA or other coverage provide benefits before the minimum annual HDHP deductible under section 223(c)(2)(A)(i) is satisfied (other than benefits permitted under a limited-purpose health FSA)." However, before the post-deductible health FSA can reimburse expenses, "a participant in a post-deductible health FSA must provide information from an independent third party that the HDHP deductible has been satisfied."

It is likely an unintended result, but a participant might have to wait for (or never receive) reimbursement for expenses that are incurred after the statutory minimum deductible has been satisfied but before the HDHP deductible has been satisfied. For example, an HDHP with a $3,000 single deductible coupled with an $1,100 single post-deductible Health FSA may see participants satisfy the lower limit but not the higher one. We suggest that section (m)(6) be changed to read: "[A] participant in a post-deductible health FSA must provide information from an independent third party that the HDHP deductible or minimum annual HDHP deductible under section 223(c)(2)(A)(i), whichever is applicable based on the design of the post-deductible health FSA, has been satisfied."
Thus, Infinisource recommends that the post-deductible Health FSA substantiation requirement be based on the applicable deductible, based on plan design.

- **Recommendation:** *Clarify how FSA experience gains or forfeitures may be used – §1.125-5(o)(1)(ii)(A).*

One permitted use of forfeitures is to "reduce required salary reduction amounts for the immediately following plan year, on a reasonable and uniform basis." It is unclear whether the phrase "immediately following plan year" means the plan year following the plan year in which the contributions were made or the plan year following the plan year in which the forfeitures were determined. Very often, the amount of the forfeiture will not be known until well into the next plan year. We suggest the first option: the plan year in which the contributions were made.

Also, it is unclear whether a plan could also use the forfeiture amount to increase the amount of benefit, on a reasonable and uniform basis. We suggest that this should be an option.

Finally, some plans would like to make a charitable contribution – perhaps non-deductible by the employer – in the same amount as the forfeiture amount. We ask that the IRS clarify whether this would be permissible use.
Thus, Infinisource recommends that the IRS clarify how forfeitures may be used by clarifying the timing of using forfeitures, allowing plans to increase benefits in the subsequent year and communicating whether a charitable donation is appropriate.

- **26 CFR §1.125-6: Substantiation**

  - **Recommendation:** *Change when a plan may terminate debit card use for an FSA – §1.125-6(d)(4).*

    The Proposed Regulations state: "The debit card is automatically cancelled when the employee ceases to participate in the health FSA." However, prior guidance (namely, Revenue Ruling 2003-43) stated a different rule: "The card is automatically cancelled at termination of employment." A strict reading of the Proposed Regulations would require plans to activate the cards of COBRA qualified beneficiaries, who elect COBRA coverage. Due to the nature of COBRA's payment grace periods (typically, 30 days after the payment due date), this would entail continually turning the card on and off and increasing the risk that the card could be used during a period of non-coverage.
    Thus, Infinisource recommends that the debit card activation rule be changed to what it was in Revenue Ruling 2003-43: when employment terminates.

  - **Recommendation:** *Clarify what the FSA certification rules are – §1.125-6(b) & (d).*

    Prior guidance required participant certification of all expenses:
    - Prop. Reg. §1.125-1, Q/A-7(b)(5): "the participant provides a written statement that the medical expense has not been reimbursed or is not reimbursable under any other health plan coverage."
    - Rev. Ruling 2003-43 & Notice 2006-69: "The employee also certifies that any expense paid with the card has not been reimbursed and that the employee will not seek reimbursement under any other plan covering health benefits."

    We could not easily locate the certification requirements in the Proposed Regulations, except for expenses substantiated by an explanation of benefits and expenses paid by debit card. We suggest incorporating the prior requirement. Also, we request that the IRS clarify what certification requirements are needed when a single debit card holds multiple purses (i.e., a stacked card). We suggest that an acceptable certification would be a reference to a separate cardholder agreement, signed by the participant that addresses permissible and impermissible uses.
    Thus, Infinisource recommends that the IRS clarify the certification requirements for FSAs, including those for a stacked debit card.

  - **Recommendation:** *Clarify what constitutes acceptable written substantiation of prescription drugs – §1.125-6(b)(3).*

    An increasingly common situation involves substantiation of prescription drugs at the local drug store or pharmacy. For HIPAA privacy reasons, the drug store or pharmacy will not include a description of the medical expense on the receipt. The Department of Health and Human Services has publicized recent violations where a pharmacy made inadvertent disclosures of protected health information. We suggest allowing receipts as acceptable

substantiation, when they simply show a prescribed drug was paid for by the participant at a drug store or pharmacy.
Thus, Infinisource recommends that the IRS clarify that a prescription drug receipt is acceptable substantiation when a pharmacist intentionally hides the drug name.

- **26 CFR §1.125-7: Nondiscrimination Testing**

  - **Recommendation:** *Clarify the timing and corrections allowed for nondiscrimination testing – §1.125-7(j).*

    The Proposed Regulations confirm that nondiscrimination testing "must be performed as of the last day of the plan year." Many plans perform testing more often, typically at the start of the plan year (after elections are made) and toward the end of the plan year (to take into account newly hired and terminated employees). We suggest that the IRS permit this practice and outline available remedies before the plan year ends, including:
    - Decreasing elections and/or benefit levels of highly compensated and/or key employees
    - Increasing benefit levels of non-highly compensated and/or non-key employees

    Thus, Infinisource recommends that the IRS clarify certain aspects of nondiscrimination testing, as described above.

  - **Recommendation:** *Clarify when union employees may be excluded for testing purposes – 1.125-7(b)(3)(ii).*

    The Proposed Regulations describe excludible employees as "[e]mployees (except key employees) covered by a collectively bargained plan as defined in paragraph (a)(11) of this section." It is unclear whether union employees are excludible even if they are covered under the same plan as non-union employees. We suggest that they should be excludible and separately tested in such circumstances.
    Thus, Infinisource recommends that union employees be excludible in all circumstances.

We want to thank IRS for these Proposed Regulations as they bring clarity and organization to this area of benefits. If you have any questions or concerns, please feel free to contact me or Connie Gilchrest, Research and Compliance Specialist, who assisted with these comments, at the phone number indicated on the bottom of the front page or via e-mail at rglass@infinisource.net or cgilchrest@infinisource.net. Thank you for your consideration.

Respectfully Submitted,

Rich Glass, JD
Chief Compliance Officer